IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.27 OF 2006

Atlas Copco (India) Limited,
a Company, registered under the
the Companies Act, 1956 and
having its registered office
at Sveanagar, Mumbai-Pune
Road, Dapodi, Pune- 411 012
and the Regional Sales Office
at Mahatma Gandhi Memorial
Building, Netaji Subhash Road,
Mumbai - 400 002. .. Petitioner.

V/s.

1. V.S. Samuel,
Assistant Commissioner of
Income-tax, Range 4(1),
Mumbai, having his office
at Room No.678, Aayakar
Bhavan, M.K. Road,
Mumbai - 400 020.

2. D.D. Gupta,
The Commissioner of Income-
tax, City-IV, Mumbai, having
his office at Aayakar Bhavan,
M.K. Road, Mumbai - 400 020.

3. Sudhir Chandra,
The Chief Commissioner of
Income-tax IV, Mumbai, having
his office at Aayakar Bhavan,
M.K. Road, Mumbai - 400 020.

4. Lakhani & Company,
Chartered Accountants, having
their office at 2nd Floor,
D.N. Road, Above Khadi Bhandar,
Mumbai - 400 001.

5. T. Diwakar Prasad, the
Dy.Commissioner of Income-tax,
Circle 8, Pune having his
office at Pratyaksha Kar
Bhavan, Near Akurdi Railway
Station, Pune 411 044.

6. Satya Prakash, the
Commissioner of Income-tax-V,

Pune, having his office at
Pratyaksha Kar Bhavan,
Akurdi, Pune 411 044.

7. S.M. Gadgil,
The Chief Commissioner of
Income-tax-I, having his
office at Sadhu Vaswani
Chowk, Pune.

8. The Union of India,
through the Secretary,
Ministry of Finance,
Government of India, North
Block, New Delhi - 110 001 .. Respondents.

Mr.F.V. Irani i/b. Mr.A.K. Jasani for the petitioner.

Mr.Ashok Kotangale with Mr.S.R. Chauhan, Mr.Prashant Uchil & Mr.A. Nagarjun for the respondents.

CORAM : R.M. LODHA &
J.P. DEVADHAR, JJ.

DATED : 7TH MARCH, 2006.

ORAL JUDGMENT (Per R.M. Lodha, J.) :

At the outset, the learned counsel for the petitioner invited our attention to the order passed by this Court in Writ Petition No.1314 of 2004, Maharashtra Distilleries Limited V/s. The Deputy Commissioner of Income Tax 6(3), Mumbai & Others on 27th July, 2004 and submitted that since the said writ petition has been admitted wherein the issue is involved whether before passing the order under Section 142(2A) an opportunity of hearing needs to be given to the assessee or not and as in the present writ petition the said issue is also raised, this

writ petition be also admitted.

2. We thought that it would be better if we consider this aspect finally at the admission stage. Hence, we heard the matter accordingly.

3. The petitioner seeks to challenge the order dated 11th November, 2005 passed by the Assistant Commissioner of Income Tax, Range 4(1), Mumbai whereby he issued direction to the petitioner for a special audit under Section 142(2A) for the assessment year 2003-04. The order is challenged on the following grounds.

i) The Assistant Commissioner of Income Tax, Range 4(1) who passed the order giving direction to the petitioner for special audit under Section 142(2A) for the assessment year 2003-04 has no jurisdiction over the petitioner’s case.

ii) That no hearing of any nature whatsoever was given to the petitioner prior to passing of the impugned order under Section 142(2A). The learned counsel relied upon the following judgements; Peerless General Finance and Investment Co. Limited &

Another V/s. Deputy Commissioner of Income-tax and Others, (1999) 236 I.T.R. 671; West Bengal State Co-operative Bank Limited V/s. Joint Commissioner of Income-tax and Others, (2004)267 I.T.R. 345, Muthoottu Mini Kuries V/s. Deputy Commissioner of Income-tax and Another (2001) 250 I.T.R. 455 and U.P. State Handloom Corporation Limited V/s. Commissioner of Income-tax and Another, (2000) 245 I.T.R. 192.

iii) That by issuing the direction under Section 142(2A) for a special audit, the assessing officer has abdicated his duty and the said directions are beyond the scope of Section 142(2A) of the Income Tax Act, 1961.

4. On the other hand, Mr.Kotangale, the learned counsel appearing for the revenue supported the order.

5. We reflected over the submissions of the learned counsel for the parties and perused the available material and the judgments cited by the learned counsel for the parties.

Re : Contention (i)

6. The learned counsel for the petitioner referred to para 1 of the petition wherein averment has been made that the respondent No.5 - the Deputy Commissioner of Income Tax, Pune has the jurisdiction over the petitioner's case under the Income Tax Act and para 7 of the reply-affidavit wherein this fact is not traversed by the revenue. He also took us through the letters exchanged between the petitioner and the respondent No.5.

7. Admittedly, the petitioner filed its return of income for the assessment year 2003-04 on 25th November, 2003 with the Assistant Commissioner of Income Tax, Range 4(1), Mumbai. There is also no dispute that the Assistant Commissioner of Income Tax, Range 4(1), Mumbai issued and served a notice under Section 143(2) upon the petitioner on 12/18th October, 2004. It is also not in dispute that though initially in the return of income filed by the petitioner for the assessment year 2003-04, a total income of Rs.54,64,90,595/- was declared but pursuant to the notice under Section 143(2), the revised return of income was filed by the petitioner on 31st March, 2005 reducing total income by Rs.7.50 crores. It is not in dispute that pursuant to the notice

issued under Section 143(2) and the revised return filed by the petitioner, the petitioner has been appearing before the Assistant Commissioner of Income Tax, Range 4(1), Mumbai. As late as on 20th September, 2005 and 14th October, 2005 the petitioner through its Chartered Accountant and Accounts Officers appeared before the Assistant Commissioner of Income Tax, Range 4(1), Mumbai. At no stage, before the Assistant Commissioner of Income Tax, Range 4(1), Mumbai, the petitioner challenged his jurisdiction on the ground that its case has been transferred to Pune. As a matter of law, it could not have been. Section 124(3)(a) of the Income Tax Act permits challenge to the jurisdiction of the assessing officer, inter alia, within one month from the date on which the assessee is served with the notice under Section 143(2) of the Income Tax Act. As already indicated above, the notice under Section 143(2) was served upon the assessee on 12/18th October, 2004. In this backdrop, the challenge to the jurisdiction of the Assessing Officer could have been done only within one month therefrom but that was not done. The communication between the petitioner and respondent No.5 is only with regard to the filing of the return of income for the assessment year 2005-06. The said communication has no relation to the return of income filed for the assessment year

2003-04. There is nothing on record that indicates that the assessment proceeding for the assessment year 2003-04 has been transferred from the Assistant Commissioner of Income Tax, Range 4(1), Mumbai to the Deputy Commissioner of Income Tax, Pune. We, thus, find no merit in the submission of the learned counsel for the petitioner that the Assistant Commissioner of Income Tax, Range 4(1), Mumbai has no jurisdiction in respect of the assessment proceedings for the assessment year 2003-04. The contention (i) of the learned counsel for the petitioner is overruled.

Re : Contention (ii)

8. The contention of the learned counsel that the petitioner must have been given an opportunity of hearing before passing order under Section 142(2A) for a special audit is based on few decisions.

9. The learned Single Judge of the Calcutta High Court in the case of Peerless General Finance and Investment Co. Ltd. (supra) held that to restrict the abuse of power under Section 142(2A), the Court will presume that the principles of natural justice are required to be complied with. It was held that by issuing direction of special audit, the assessee

may be deprived of some right and such order entails in civil consequences.

10. In the case of Peerless General Finance and Investment Co. Ltd., it is pertinent to note that the assessing officer without placing the material before the Chief Commissioner of Income Tax appointed the auditor and in that backdrop, the learned Single Judge observed that the case depicted as to how the power can be abused.

11. In the case of West Bengal State Co-operative Bank Limited (supra), the learned Single Judge of the Calcutta High Court relied upon the judgment in the case of Peerless General Finance and Investment Co. Ltd., and took the view that the assessee needs to be heard before passing an order for special audit.

12. According to the learned Single Judge of the Kerala High Court in the case of Muttoottu Mini Kuries (supra), Section 142(2A) postulates right of hearing. In this case also, the learned Single Judge relied upon the judgment of the Calcutta High Court in the case of Peerless General Finance and Investment Co. Ltd.

13. Mr.Ashok Kotangale, the learned counsel

appearing for the revenue, on the other hand, relied upon the Division Bench judgment of the Allahabad High Court in the case of Jhunjhunwala Vanaspati Limited V/s. Assistant Commissioner of Income-tax and Another, (2004) 266 I.T.R. 657. The Division Bench of the Allahabad High Court in clear and unambiguous terms gave its opinion that it was not necessary for the Assessing Officer to issue a show cause notice or give a hearing to the assessee before issuing the direction of special audit under Section 142(2A). The Division Bench of the Allahabad High Court held that an order under Section 142(2A) giving direction of special audit does not entail any civil consequences nor affects the rights of the assessee. Such order does not create any liability against the assessee. The Allahabad High Court held thus :

> "A bare perusal of sub-section (2A) of section 142 shows that all that is required therein is that the Assessing Officer should be of the opinion that in view of the nature and complexity of the accounts of the assessee and the interest of the Revenue it is necessary to direct special audit of the assessee's accounts.
>
> In our opinion, it is not necessary for the Assessing Officer to give a show cause notice or give a hearing to the assessee before issuing the directions under Section 142(2A). In our opinion, the direction under sub-section (2A) of section 142 is purely administrative in nature and not quasi judicial. Moreover, in our opinion, such a direction does not have civil consequences. It does not affect the assessee's rights or liability. Hence, the decision of the Supreme Court in State of

> Orissa v. Dr.Binapani Dei, AIR 1967 SC 1269 does not apply. No doubt an administrative order if it has civil consequences can only be passed after giving opportunity of hearing, but in our opinion a direction under sub-section (2A) of section 142 does not have civil consequences because it does not affect his rights and does not create any liability against the assessee. It is only the assessment order which will create a liability. The purpose of the direction under sub-section (2A) of section 142 is to ensure that a correct assessment order is passed so that the Revenue is not deprived of its dues. Hence, we do not agree with learned counsel for the petitioner that an opportunity of hearing or show cause notice has to be given to the assessee before passing the direction under section 142(2A)."

14. That the order passed under Section 142(2A) is purely administrative in nature and that such order is not quasi judicial admits of no ambiguity. The law-makers while enacting Section 142(2A) empowered the assessing officer to direct the assessee to get the accounts audited by Special Auditor. The legislature, to ensure that such power is not abused, provided safeguards. For forming an opinion as to whether it is necessary to have the accounts of the assessee audited by a special auditor, the Assessing Officer has to have regard to the nature of complexity of the accounts of the assessee and the interest of the revenue. After forming such opinion, he has to seek the approval of the Chief Commissioner or the Commissioner, as the case may be, before any direction is issued to the assessee to have his accounts audited by a special

auditor. This by itself is a vital safeguard in preventing abuse of power. In the very scheme of things, we are unable to read that the assessee needs to be heard before the directions are issued to the assessee for audit of its accounts by a special auditor. Such order, in our opinion, does not entail any civil consequences. No decision is given. Merely because the assessee is required to pay the auditor's fee, that does not mean that any liability is created against the assessee and that such order entails any civil consequences. The issuance of direction for special audit facilitates the Assessing Officer to have the complex accounts of the assessee examined by an independent auditor. That helps and assists him in assessing the income of the assessee. We find ourselves in agreement with the view of the Allahabad High Court in the case of Jhunjhunwala Vanaspati Limited (Supra) and respectfully disagree with the view of the Calcutta High Court in the case of Peerless General Finance and Investment Co. Limited (supra) and West Bengal State Co-operative Bank Limited (supra) and the view of the Kerala High Court in the case of Muthoottu Mini Kuries (supra). In our opinion, the assessee is not required to be heard before passing an order under Section 142(2A) of the Income Tax Act, 1961.

15. In so far as the present case is concerned, it would be seen that after the return of income was filed by the assessee on 25th November, 2003, a notice under Section 143(2) of the Income Tax Act was issued and served upon the petitioner on 12/18th October, 2004. Pursuant thereto, the petitioner appeared through its Chartered Accountant and Accounts Officers from time-to-time in the proceedings before the Assessing Officer. On behalf of the assessee, it was admitted before the assessee in the proceedings on 20th September, 2005 that the transaction with M/s.Utkal Investment Limited was very complicated and the matter needed to be considered with regard to the provisional agreement which also contained the non-compete agreement. Various queries that were raised by the assessing officer were not fully answered by the assessee. This aspect is reflected from the proceedings dated 20th September, 2005. That there is complexity of accounts is evident from the consideration of the matter by the assessing officer and the Chief Commissioner of Income Tax-IV, Mumbai. In para 14 of the reply-affidavit filed by the respondent No.1, it is stated thus :

> "1. The Petitioner had submitted only part of the details called for during the assessment proceedings for A.Y. 2003-04. Even though a detailed questionnaire was issued to the Petitioner as early as

09.08.2005, important details like the write-up on the reasons necessitating the revised return, details of expenses debited to the P & L Account, details of commission payments are still to be submitted alongwith other details till date. In fact, during the course of assessment, it is admitted by the Petitioner's representative that the revised return was filed subsequent to obtaining additional opinion from Shri Soli Dastur, Advocate. It is stated that the transaction with M/s.Utkal Investment Ltd. is very complicated and the matter has to be considered with reference to the provisional agreement which also contained the non-compete agreement. The circumstances under which M/s.Utkal Investment Ltd. went to court subsequent to M/s.Atlas Copco (Parent Company to Petitioner) acquired M/s.Ingersoll Rand globally has to be taken into account regarding the need of the agreement and the resultant revised return of income. However, the Petitioner has failed to make its submission in this regard till date.

2. The Petitioner-company is having huge business turnover of Rs.254 Crores which consist of turnover of various divisions and units. The assessee company is engaged in manufacturing activity, trading activity, export of goods, investment activities and has number of divisions and the individual accounts of the divisions are merged to form combined results. The assessee company has various branches / divisions and have claimed substantial amount of deductions under different provisions of Income-tax Act. The accounting year followed by the petitioner under the Companies Act is the Calendar Year and the accounting year for tax purpose is the Financial Year. In addition to above various issues, the fact of merger of M/s. Chicago Pneumatic Ltd. with the Petitioner-company in the past has made the examination of the accounts further complex in nature. Further, there are many issues in the return of income for A.Y. 2003-04 which are complex and require thorough examination, some of which are as under :

(i) Bad Debts :

On examination of the earlier year's

claim for bad debts it was found that the Petitioner's claim for bad debt was unacceptable since the conditions as laid down by sec.36(i)(vii) of the I.T. were not met.

(ii) Commission Payment :

Huge expenses have been claimed by the Petitioner on account of commission payments. On verification of such claim in the earlier year it was found that the Petitioner was not in a position to justify either the genuineness or the necessity of the commission payment.

(iii) Stock Write Off :

The Petitioner company regularly claim write off of huge quantities of stock on account of alleged obsolescence. However, all such written off stock are thereafter found to be in the possession of the Petitioner. A large number of items are manufactured by the petitioner. Accordingly, the determination of the claim of obsolescence becomes a very difficult exercise.

(iv) Claim u/s.80HHC :

In terms of the decision of the Hon'ble Supreme Court in the case of IPCA Ltd. it is the duty of the Petitioner to establish that it had earned profit in its export activity. Since the Petitioner is maintaining combined books of accounts, it is very difficult to correctly ascertain the profit arising out of its export activity."

16. The transaction with M/s.Utkal Investment Limited is admittedly complicated. For the reasons recorded by the Assessing Officer as well as the approving authority, we find that the opinion of the assessing officer that there is complexity of the

accounts for computing the true and chargeable income of the assessee-company for the assessment year 2003-04 and that it is in the interest of the revenue and that special audit is required, is not unfounded and cannot be said to be based on no material or that the order under Section 142(2A) has been passed without proper application of mind.

Re : Contention (iii)

17. Mr.F.V. Irani, the learned counsel for the petitioner argued that by issuing direction for audit of the accounts by the special auditor, the confidential documents shall be disclosed to third party and that there shall be disruption of activities. He contended that the Assessing Officer has abdicated his duty and that certain aspects referred to the special auditor are beyond the scope of Section 142(2A). We are not persuaded by the submissions. In the very scheme of Section 142(2A), where a special audit is ordered by the assessing officer, on fulfilment of the conditions prescribed therein, obviously, the accounts of the assessee are audited by a person so appointed specially. Seen thus, the provision contained in Section 142(2A) contemplates audit of the assessee’s accounts by a third person. The audit by the special auditor, in

the circumstances, is a step for the completion of the assessment proceedings and, therefore, there is no substance that the confidential documents shall be disclosed to third party. For the reasons that have been indicated by the Assessing Officer in directing audit of the assessee's accounts, it cannot be said that the assessing officer has abdicated his duty. The findings on various issues by the special auditor as required in the order under Section 142(2A), obviously, cannot be final but shall facilitate the Assessing Officer in understanding the complex nature of assessee's accounts and correctly assessing the assessee's income.

18. We have no hesitation in concluding that the order dated 11th November, 2005 giving direction to the petitioner for special audit under Section 142(2A) for assessment year 2003-04 does not suffer from lack of jurisdiction or error of law.

19. The writ petition is, accordingly, dismissed. No costs.

(R.M. LODHA, J.)

(J.P. DEVADHAR, J.)